ROBERT E. ORISKOVICH

IBLA 86-644 Decided December 13, 1988

Appeal from a notice of noncompliance by the Acting District Manager, California Desert District, Bureau of Land Management, directing mining claimant to bring his operations in compliance with applicable regulations and requiring him to furnish bond. CA 69-PO-84-6. (CAMC 120424, CAMC 120430.)

Vacated in part, affirmed in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations

   A notice of noncompliance issued to an operator conducting operations under an approved plan of opera- tions for failure to comply with 43 CFR 3802.4-6, will be vacated even though the operator's attitude at different times appeared to BLM to be hostile, abusive and confrontational where the record shows that the authorized officer was able to make regular compliance investigations of the site, and held telephone conversations with the operator about his mining activities.

2. Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations

   An operator conducting operations under an approved plan of operations is required under 43 CFR 3802.4-7 to notify the authorized officer of any suspension of operations within 30 days after such suspension. Where evidence offered on appeal shows that operations are continuing, the lack of activity observed between a 30-day period by itself is insufficient to subject the operator to the notice requirement of the regulation, and a notice of noncompliance issued for failure to give such notice will not be sustained on appeal.

3. Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations--Wilderness Act

   Mining operations within wilderness study areas must be conducted under properly filed and approved plans of

operations. Where a claimant appeals a notice of noncompliance, and on review the record establishes that operations being conducted exceed those authorized by BLM, and described in the plan of operations, the case will be remanded for the filing of a proper plan of operations and the posting of bond to ensure reclama-tion of the site after operations are completed.

APPEARANCES: William Perry Pendley, Esq., Fairfax, Virginia, and Edwin J. Dotson, Esq., Las Vegas, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Robert E. Oriskovich has appealed from a notice of noncompliance dated January 29, 1986, issued to him by the Acting District Manager, California Desert District, Bureau of Land Management (BLM), citing appellant's operations on the Moon Star unpatented mining claims in sec. 14, T. 12 N., R. 15 E., San Bernardino County, California, for failure to comply with several regulations at 43 CFR 3802. The claims are located within the Table Mountain Wilderness Study Area (WSA-720).

The most troubling aspect of this case concerns appellant's plan of operations (P.O.) which was approved by the Area Manager, Needles Resource Area, in a letter dated November 17, 1983, as a P.O. for exploration. While the regulations do not require a special form for a P.O., they do state with specificity what should be included in an acceptable P.O. What purports to be appellant's P.O. is filed on a form entitled "Suggested Format For Your Notice." The word "Notice" is crossed out and the abbreviation "P.O." sub-stituted. The form, signed by appellant on September 1, 1983, bears no BLM approval stamp nor official signature. A note on the BLM form "Checklist for 3802/3809 Plans of Operations" instructed BLM personnel to "treat the notice of intent as a plan of operations." In his P.O., appellant described his intention to widen an existing road and to build a road up a mountain to allow access for core drilling equipment. He stated that buildings would be required for cooking and sleeping quarters and for an office of operations. He further envisioned that 2 to 4-l/2 acres would be cleared for stockpiling, base of operations, wet wash table, holding tanks, and skip loaders. The "Intent" form which was used as appellant's P.O., contains a reclama-tion statement that all disturbed areas "will be completed to the standard described in 43 CFR 3809.1-3(d) and that reasonable measures will be taken to prevent unnecessary or undue degradation of federal lands during operations." The area geologist recommended that no bond be required, and further recommended that "this operation should be inspected monthly to insure that activities not approved don't occur; this P.O. is more ambiguous than most."

In his November 17, 1983, letter the Needles Area Manager advised appellant that his P.O. had been approved subject, however, to 18 stipulations set forth in the letter. These stipulations included cautionary measures to be employed during operations in dealing with cultural artifacts, vegetation, water, disposal of waste, recontouring of disturbed

areas, etc. For example, stipulation 5 required that all pits and trenches be backfilled upon cessation of exploration activities. Stipulation 17 required all trash to be removed from the WSA. The final paragraph of the area manager's letter stated:

> Conversations with you and your field personnel with my own employees - John Bailey and Jerry Needy - has presented a con- fused picture of what you actually intend to do. This plan authorizes you to widen the existing routes to your worksite and perform core drill exploration in the areas marked on your maps as "K & S #1 and K & S #2." Any additional work will require an amendment to this plan.

Under 43 CFR 3802.1-4(c)(3) a P.O. is required to include: "Informa- tion sufficient to describe either the entire operation proposed or reason- ably foreseeable operations and how they would be conducted, including the nature and location of proposed structures and facilities." Since BLM had a "confused picture" of what appellant actually intended to do, it would seem that under this regulation, it would have been appropriate for BLM to require appellant to file a more detailed description of his planned operations. The P.O., as confusing as it was, was obviously acceptable to BLM, as it was approved as to specific activities. While the opening paragraph of the approval letter BLM stated: "Your plan of operation for exploration work on some of your Moon Star mining claims has been approved," the final paragraph of the letter cited above made it clear that appellant's P.O. was approved, limiting operations to widening existing routes to his worksite and to performing core drilling. As noted earlier, the P.O. in addition to widening existing roads and core drilling, described building a road up a mountain for trucks and mining equipment, the need for buildings to serve as sleeping quarters for personnel and office operations and supplies, and of clearing up to 4-1/2 acres, inter alia. The approval letter, did not address any of these additional operations.

Throughout this controversy there reigned great uncertainty as to what the P.O. authorized appellant to do, or not to do. The extent of this doubt is graphically revealed by the record. A note regarding the details of a telephone conversation of April 4, 1984, between BLM and appellant notes that appellant stated he would use helicopters to bring in drill rigs for core drilling on the mountain instead of putting in a road, and that he would come in for a permit. On April 13, 1984, the Needles Area Manager wrote to appellant after an on site inspection conducted April 3, 1984, to advise him of BLM's concerns relative to his operations. That letter states in part:

> 3. Earlier in conversations with John Bailey of this office you agreed that your activities would be exploration only since approving an actual mine would make no sense unless exploration had "located" and proved the existence of an ore body of sufficient value to justify a mine. Our original approval letter, dated November 17, 1983 reflected this agreement to explore only.

Our concern here involves statements that you and your wife have made that you intend to stay at the mine site another twenty to twenty-five years, contrary to your being notified in our original approval letter that exploration activities and reclamation must be completed before the Secretary of the Interior is scheduled to send his recommendations on the area's wilderness classification to Congress. Exploration activities on the claims at the Moon Star site would normally be expected to not involve more than a few weeks of work.

4. You appear to have set up a permanent residence at the site. (This is also supported by the statements referred to in item 3). The Congress, on July 23, 1955 passed Public Law 167, which forbids uses of mining claims "* * * for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." A primary objective of the law (30 U.S.C. 612a) was to deter abuses of the mining law by prohibiting no mining activities for example, residential use, under the guise of mining locations.

As we have only authorized exploration activities, residential occupancy is not authorized. Any residency or construction of residential improvements on a claim where diligent, bona fide mining operations are not evident may constitute a trespass.

The unauthorized use of a mining claim can become a very serious problem for the claimant, particularly when a valuable improvement is constructed or placed on an unpatented claim.
Such a person stands to lose all his investment, including the claim itself, because of such trespass action.

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6. In conversation with Roger Britton April 4, 1984, you agreed to use a helicopter to move a drilling rig to areas that have no roads or means of other areas in the K & S #1 and K & S #2 claims. Please follow your agreement on this matter.

In a March 11, 1986, memorandum to the State Director, the Acting District Manager, California Desert District, stated that the P.O. approved in November 1983 included the construction of a cabin, however no approval for construction of any kind was discussed by BLM in the approval letter. On May 4, 1984, BLM officials visited appellant's site for a compliance check. A memorandum of the visit notes:

So far areas that have been disturbed can be easily reclaimed. Nothing has been done that was not approved in advance. A "temporary" structure has been built, however, that while not impairing the area, nevertheless seems to be unnecessary to explore the claim. There still seems to be confusion between

BLM and the operator about what "exploration" and "development" activities are.

BLM undertook a further compliance check on October 26, 1984. At this inspection BLM officials observed about 16 samples of crushed rock, a small rock crusher, a miniature backhoe, 3 gun emplacements, 3 trenches about 5 by 10 feet and 5 feet deep, and 2 pits about 30 by 40 feet and 10 feet deep. Appellant's wife stated that the gun emplacements (holes in the ground with rock barricades) were for spotting hunters. BLM also observed several broken-down vehicles on the site. BLM concluded from the inspection that appellant apparently was doing some exploratory work "although it is doubtful that the amount of work done has justified seven people staying at the site in a temporary structure." 1/

Further inspections were made between February 10 and November 22, 1985. BLM's memorandum of an inspection on June 9, 1985, notes that some activity appeared to be taking place and further notes that a young man at the site advised that material had been removed from the claims and shipped to Las Vegas for testing. BLM's next inspection occurred on September 30, 1985. In his memorandum, BLM's geologist states that he "observed no evidence of recent exploration activity * * * other than about two truckfuls of placer material that had been removed from the wash near the cabin, apparently last June." He also noted an "outhouse, one horse stall and a starving horse, four junked vehicles, piles of junk, one cabin, and one unused helicopter pad." He also reported having been told by the young man staying at the site that exploration "has consisted of no more than a few days work." BLM's geologist again visited the claims on November 22, 1985. The report of this inspection states that no new evidence of exploration activity was observed but that the starving horse had been removed, and that there had been at least a partial attempt to clean up the site. However, the junked vehicles were still in the same place despite numerous BLM requests to have them removed.

The record contains 30 BLM photographs depicting the claims. These photographs are marked "1/86" and show a processing date of February 1986. They depict a cabin, a building under construction, several pieces of equipment, various excavations, junked vehicles, and other debris. Also shown is a wide area in a road marked by rocks, which the parties describe as a helicopter landing pad.

BLM's notice of noncompliance charged appellant with failing to comply with 43 CFR 3802.1-6, 3802.4-6, and 3802.4-7.

BLM's decision gave appellant three options. The first was to stop all operations and reclaim the site within 30 days. The second was to submit a new or amended P.O., clean up the site, and furnish a performance bond within 30 days. The third option was to cease immediately all operations

1/ Memorandum dated Oct. 26, 1984, from BLM's geologist to the Needles Area Manager.

other than those authorized in the initial P.O., to remove trash, reclaim emplacements, trenches, and helipad within 30 days, and furnish a bond guaranteeing reclamation in the amount of $7,500.

Rather than exercising any of these options, appellant chose to appeal. He contends that he is in compliance with the regulations and his P.O., and that no supplemental P.O. is required. 2/

[1] 43 CFR 3802.4-6 requires the authorized officer to periodically inspect operations to determine if the claimant is complying with the regulations and his approved P.O. BLM's decision states that appellant's behavior was "viewed as an attempt by [appellant] to prohibit inspections of the site." In addition to several reports of site inspections, the file contains memoranda of telephone conversations between appellant and BLM employees. These documents indicate that appellant at times treated BLM personnel rudely, made belligerent threats, and employed abusive language. Apparently appellant also indicated his contempt of WSA's, telling officials that he could make use of his influence in Congress to have his claims removed from WSA status. 3/ Though relations between the parties may have been confrontational rather than harmonious, appellant's conduct did not deter BLM from making its compliance inspections. Hence appellant cannot be charged with preventing the authorized officer from inspecting the site.

[2] 43 CFR 3802.4-7 requires an operator to notify BLM of any suspension of operations within 30 days after such suspension. BLM's decision refers to 11 dates on which inspections were performed by a BLM geologist and/or Ranger during 1985 which indicated that operations had been shut down

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2/ It appears that appellant has been attempting to submit a new P.O. to BLM for approval. On Feb. 29, 1988, BLM submitted a copy of a memorandum to the State Director from the District Manager, California Desert District, concerning a request for a review of a Plan of Modification of the Moon Star Mine. Therein the District Manager refers to a letter dated Nov. 16, 1987, which requested appellant to modify his approved P.O. in order to comply with the nonimpairment standard. Appellant filed his modification on Nov. 27, 1987, which BLM determined did not comply with the nonimpairment standard. The memorandum specifically requests the State Director to review the record related to actions commencing subsequent to his memorandum of Apr. 17, 1987, and recommended that appellant be required to comply and submit a modified plan addressing the elements of the Area Office's Nov. 16 request. None of the documents referred to in the memorandum were forwarded to the Board. Whether the P.O. under consideration covers the entire Moon Star operation, as opposed to the areas K&S #1 and K&S #2, which are the subject of this appeal is not clear. We note, however, that appellant, having elected to appeal the letter of noncompliance, relieved BLM of its authority to act further in the matters pending before the Board relative to the P.O. for these claims. Sierra Club, 57 IBLA 288 (1981).

3/ Memorandum dated Oct. 26, 1984, from BLM's geologist to the Needles Area Manager.

for several periods in excess of 30 days during the year and that only a few days' work had been performed. The decision further states that "[i]ndividuals living at the site have stated that only a few days worth of work [have] been done at the site in the past year."

The case file forwarded by BLM does not provide any indication of appellant's work patterns or schedules. BLM's conclusion that work was shut down for periods in excess of 30 days appears to be based on the September and November 1985 compliance checks after which BLM's geologist noted he had seen no evidence of recent exploration activity. These observations are vague, and while they may permit an inference of unauthorized work stoppage, they are not sufficient for the Board to make such a finding.

On January 25, 1988, appellant filed a "Motion to Dismiss" and attached statements by himself and his employees as evidence to contradict the BLM conclusions that he had suspended operations in violation of the regulations.

In appellant's declaration, he states:

> I had not shut down operations. In fact, I have been diligent in my efforts to move to patent and to market my claims consistent with the rules and regulations of the Bureau of Land Management, since work on the mining claims has continued and development work of sampling and assaying has been done on a daily basis from, on or about, September 1984, at least through January 29, 1986, * * *.

Appellant additionally claims that he has evidence of "daily logs and other records [to] show that the operations were not suspended for thirty days at any time" (Oriskovich Declaration at 3). The affidavit of Robert Vincent Koury, an employee of appellant, describes the work he has done on the claims since September 1984, consisting of sampling "on a daily basis, with the exception of weekends" and states that:

> [A]t the time the samples were taken, I made field notes. At the time, all field notes were indexed by number, and a section map has been prepared in every instance, with the samples taken being logged therein. I have made a daily log of all samples taken [which] has been prepared and maintained and is available, and I have maintained a continuous program of sampling and assaying from December, 1984, at least through the end of January of 1986. These records of the sampling and assays have been maintained in my handwriting and are available.

(Koury Declaration at 1 and 2). Arthur M. Mathieu, a geologist employed by appellant, submitted an affidavit in which he states that he began assisting appellant in preparing and installing an operation for a complete pilot plant for the purpose of producing Micron gold from gold ores located on the claims. He states:

> In November, 1985, I began devoting my full time to the Moon Star operation. I moved to Moon Star claims and helped set up the equipment and the building for the milling of the ore produced at the Moon Star claims and developing a pilot plant for the purpose of extracting the gold located in the Moon Star claims.

(Mathieu Declaration at 2). Another affidavit prepared by Dwayne Phillip Partridge, an employee at the Moon Star, states that work on the claims has been continuous. Partridge states that he has "been involved in the construction of the pilot plant, and I have seen the work continue on a daily basis" (Partridge Declaration at 2).

We note that none of these "affidavits" are under oath, subscribed and sworn before a notary, nor have any of the documents which the witnesses maintain exist to document continuous work on the claims been included. Assuming BLM was correct, and appellant's operations had stopped for a 30-day period between September and November of 1985, appellant has offered evidence on appeal which tends to show that operations thereafter resumed. Under the circumstances, we do not find that appellant's lack of activity for that 30-day period is sufficient to establish that he was subject to the notice requirement of 43 CFR 3802.4-7.

[3] 43 CFR 3802.1-6(a) requires an operator to file a supplemental plan prior to undertaking any operation not covered by the initial plan. BLM's decision states that appellant should have filed a new plan because his helicopter landing pad, fortified emplacements, placer trenching (as opposed to core drilling), and the horse stall and horse were not authorized by the original plan.

Appellant states that the helipad is a minor improvement under 43 CFR 3802.1-2(c) 4/ for which no P.O. is required. Appellant refers to the fortified emplacements as protective banks of dirt around his living area. He explains the placer trenching as an exploratory activity carried on to locate a stable and proper base on which to conduct core drilling. Further, appellant states he intends to begin a plan of core drilling in order to block out ore bodies. Appellant asserts that the junked vehicles have been removed from the site, that refuse is regularly removed, and that no bond should be required.

BLM did not allege that appellant should have filed a modification of the P.O. because of his "pilot plant," described in the declarations submitted on appeal. Indeed, it is doubtful whether BLM was aware of this operation. Appellant's own submissions, however, show that his operations have exceeded those set out in his initial P.O., and the notice of noncompliance in this respect must be sustained.

4/ 43 CFR 3802.1-2(c) states that a P.O. is not required for making "minor improvements of existing * * * landing areas for aircraft." (Emphasis supplied.) However, 43 CFR 3802.1-1(a) requires an approved P.O. where landing areas for aircraft will be constructed.

The purpose of the regulations at 43 CFR Subpart 3802 is to establish procedures to prevent impairment of the suitability of lands under wilderness review for inclusion in the wilderness system, to prevent unnecessary and undue degradation, and to protect the environment (43 CFR 3802.0-1). The regulations apply to mining operations as those operations affect the resources, the environment, and wilderness suitability. "Mining operations" include all functions, work, facilities, and activities in connection with the prospecting, development, extraction, and processing of mineral deposits (43 CFR 3802.0-5(f)).

BLM's authority is derived from section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1782(c) (1982), which governs the management of a WSA during the period of wilderness review. Departmental regulations require BLM to review original or modified mining plans under the nonimpairment standard. See 43 CFR 3802.1-5(b) and 3802.1-6(c). After assessing such plans BLM must either approve the plan subject to measures designed to prevent impairment, or reject the plan where anticipated impacts of mining operations would result in impairment of the area's suitability for preservation as wilderness. 43 CFR 3802.1-5(b)(3). See L. C. Artman, 98 IBLA 164, 167 (1987).

Under 43 CFR 3802.1-6(a), an operator is required to file an amended P.O. prior to undertaking any operations not covered by the initial P.O. 43 CFR 3802.1-6(b) provides that the authorized officer "may initiate" the modification of a plan when changes occur that were unforseen when the initial plan was filed. Where the authorized officer recommends to the State Director that a modification is required, he must set forth support-ing facts and reasons. The State Director is then required to determine

> (1) whether all reasonable measures were taken by the authorized officer to predict the environmental impacts of the proposed operations; (2) whether the disturbance is or may become of such significance as to require modification of the plan of operations in order to meet the requirement for environmental protection specified in | 3802.3-2 of this title, and (3) whether the disturbance can be minimized using reasonable means. Lacking such a determination by the State Director, an operator is not required to submit a proposed modification of an approved plan of operations.

43 CFR 3802.1-6(b).

The record does not reflect that the State Director has made a determination that appellant is required to submit a modification of his P.O. Thus, under the regulations appellant would ordinarily be permitted to continue to operate under his existing P.O., an option provided in the letter of noncompliance. The confusion, however, existing between BLM and appel- lant over what operations are permitted under the approved P.O. is such that we do not agree that appellant can proceed with any operations autho- rized by the letter of approval. The P.O. submitted by appellant was

considered and partially approved, even though it presented a "confused picture" of what he intended to do. BLM, by informing appellant that
"Your P.O. is approved," but authorizing limited operations, essentially rejected the P.O. We are not suggesting that BLM is without authority to partially approve a P.O. submitted by an operator, however, in such a
case, an operator is entitled to an explanation as to why certain of the operations described are not subject to approval. The approval letter
sent to appellant was misleading and fueled the confusion. We note the regulations contemplate review and approval where appropriate of the P.O.'s submitted by operators. Thus, even if we were to conclude that appellant's operations had not exceeded those authorized, we would nevertheless require appellant to submit a new P.O., the contents of which are consistent with 43 CFR 3802.1-4(c)(3), and direct BLM to make the proper determinations
and review it in light of the requirements of the applicable regulations.

Obviously, appellant considered the approval letter to authorize the extensive operations described in his P.O. We do not find that to be a reasonable interpretation of the approval letter in light of the concluding paragraph which specified what operations were authorized. BLM in its letter of October 26, 1984, referred to conversations about an "agreement to explore only." This agreement or understanding is not documented in the record and we do not read the conflicting paragraphs in the approval letter to establish that any such agreement existed. What is clear is that BLM did not intend to approve the entire P.O. submitted. Appellant and BLM have differing opinions as to what operations were authorized. Even though the
letter approving the P.O. for exploration is very specific, it is apparent from the record that some BLM personnel had a different understanding of what activities were authorized in the approval letter. Under the circumstances, allowing appellant to proceed with activities under the approval letter would only generate more confusion and confrontation.

From the description of the work performed on the claims, as detailed in the statement of appellant and his employees, it is clear that appellant has proceeded with operations more extensive than those authorized by BLM, and even beyond those described in his P.O. As noted earlier, appellant's geologist described his involvement in ore extraction and processing operations on the claims. Such activities require an approved P.O. See 43 CFR 3802.1-1. Because appellant has undertaken these activities, a proper P.O. must be filed and approved. In connection with such filing BLM may properly require the furnishing of a bond to ensure reclamation of the site after operations are completed. See 43 CFR 3802.2.

In conclusion, we find that BLM has not demonstrated that appellant violated the provisions at 43 CFR 3802.4-6 and 43 CFR 3802.4-7, and as to those violations the decision must be vacated. The record does, however, support the finding that appellant is required to furnish a bond to cover reclamation of the site and that he is required to submit a new P.O.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the notice of noncompliance is vacated in part, affirmed in part and the case file is remanded to the California Desert District Office.

Gail M. Frazier
Administrative Judge

I concur:

Kathryn A. Lynn
Alternate Member
Administrative Judge